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Is the Prohibition of Homicide Universal?

EVIDENCE FROM COMPARATIVE CRIMINAL LAW

John Mikhail^{*}

Is morality universal, and should the law care? The topic of this Symposium could be addressed from many vantage points. In this Essay, I sketch one approach that seems to me both interesting and fruitful, while nonetheless recognizing that it is merely one among many possible avenues to explore in this rich vein.

^{*} Professor of Law, Georgetown University Law Center. The research described in this Essay was presented at Brooklyn Law School as part of a Symposium sponsored by the Brooklyn Law School's Center for the Study of Law, Language, and Cognition and the *Brooklyn Law Review*. I wish to thank Professor Lawrence Solan, Director of the Center, for organizing the Symposium and inviting me to participate in it, as well as the Editors of the *Brooklyn Law Review* for their superb assistance in publishing this Essay. The research has also been presented in numerous other venues, including workshops and conferences sponsored by the Air Force Office of Scientific Research; California Institute of Technology; Harvard Law School; MIT Computer Science and Artificial Intelligence Laboratory; MIT Department of Brain and Cognitive Sciences; Office of Naval Research; Sante Fe Institute; Society for Evolutionary Analysis in Law; UCLA Center for Behavior, Evolution, and Culture; United Kingdom Arts and Humanities Research Council; University of Chicago Center for Law, Philosophy, and Human Values; and University of Maryland Cognitive Science Colloquium. I am grateful to the organizers of these events as well as the many participants and other colleagues whose comments and feedback have helped to sharpen my understanding of various aspects of this project. In particular, I wish to thank Ralph Adolphs, Scott Atran, Clark Barrett, Jonathan Baron, Paul Bello, James Blair, Paul Bloom, Susanna Blumenthal, Alexander Bolyanatz, Sam Bowles, Rob Boyd, Peter Carruthers, Noam Chomsky, Emma Cohen, Fiery Cushman, Martin Daly, Antonio Damasio, John Darley, Frans de Waal, Bart Du Lang, Sue Dwyer, Dan Fessler, Simon Fitzpatrick, Herb Gintis, Ryan Goodman, Alison Gopnik, Joshua Greene, Jon Haidt, Brian Hare, Ray Jackendoff, Derek Jinks, Owen Jones, Robin Kar, Mark Kelman, Katie Kinzler, Adam Kolber, Joshua Knobe, Rob Kurzban, Steve Laurence, Brian Leiter, David Luban, Matthias Mahlmann, Sarah Mathew, Reid Montague, Shaun Nichols, Jim Nickel, Julie O'Sullivan, Jesse Prinz, Tage Rai, Whitman Richards, Rebecca Saxe, Mike Seidman, M.B.E. Smith, Elizabeth Spelke, Jeffrey Stake, Stephen Stich, Peter Tague, Josh Tenenbaum, Laura Weinrib, Margo Wilson, Andrew Woods, Amanda Woodward, Liane Young, and Eyal Zamir for their advice, criticisms, and encouragement. Much of the data described herein was collected and analyzed by an exceptional group of research assistants, including Martin Hewitt, Kevin Kramer, Jennifer Rosenberg, Amber Smith, and, most significantly, Michael Dockery and Modest Kwapinski. I also wish to recognize the extraordinary research support provided by the librarians of Georgetown University Law Center, who helped to identify and locate many of the penal codes utilized in this research. This investigation was supported in part under AFOSR MURI award FA9550-05-0321.

Whether moral universals exist is one of history's most widely debated topics. Virtually everyone has an opinion about it, and much ink has been spilled over the matter. Among serious researchers, one might expect that broad and vaguely defined questions like this would give way to more narrowly focused inquiries; for example, whether any specific acts, such as murder, are universally prohibited, and if so whether the content of these prohibitions is largely uniform across cultures or varies significantly among different societies. This way of framing the inquiry shifts the focus, at least initially, from morality to law, on the assumption that the law frequently "is the witness and external deposit of our moral life"¹ and that at least some crimes and other legal prohibitions rest on "immemorial ideas of right and wrong."² Their legal pedigree may depend on official recognition or positive enactment, but their ultimate source is rooted in customary morality or customary law. This formulation also substitutes a tractable empirical question for a potentially interminable philosophical debate. Presumably there is an answer to the question of how uniform or widespread certain legal prohibitions are, for which a range of compelling evidence can be brought to bear. It seems reasonable to assume, therefore, that one might make some progress on the question presented by examining the various penal codes that exist throughout the world and determining the precise extent to which they overlap with respect to particular acts, such as murder or other forms of homicide.

Surprisingly, hardly any systematic research has been done to examine this question. The leading social scientific studies of homicide, such as Martin Daly and Margo Wilson's *Homicide*³ or Dane Archer and Rosemary Gartner's *Violence and Crime in Cross-National Perspective*,⁴ contain many valuable insights, but they do not squarely address the existence of substantive moral or legal universals or their codification in positive law. Daly and Wilson's study is mainly concerned with the behavioral profile and evolutionary psychology of homicide, of *who* kills and why, while Archer and Gartner's book is focused primarily on homicide *rates*, that is, on recorded patterns of homicide and other violent crimes in different cultural contexts.

¹ O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

² GLANVILLE WILLIAMS, CRIMINAL LAW 292 (2nd ed. 1961).

³ MARTIN DALY & MARGO WILSON, HOMICIDE (1988).

⁴ DANE ARCHER & ROSEMARY GARTNER, VIOLENCE AND CRIME IN CROSS-NATIONAL PERSPECTIVE (1984).

Neither volume seeks to describe a shared blueprint for considered judgments about homicide or their basis in human moral cognition. Although anthropologists, cognitive scientists, and other researchers have occasionally undertaken to study in general terms the role of intent, causation, and other elements of blame and responsibility in different cultural contexts, the ethnographic record is likewise largely devoid of the kind of detailed analysis of *mens rea*, *actus reus*, and available defenses or their civil law counterparts that might uncover the precise structure of a universal prohibition against homicide or its basis in human cognitive capacities.⁵ As a result, even answers to relatively simple questions, such as whether every known society utilizes an intent requirement or recognizes some kind of insanity, necessity, or mistake of fact defense, remain elusive and unavailable.

For their part, legal scholars have also generally failed to investigate the potential global reach of a specific, structured homicide prohibition. At least two major factors appear responsible for this puzzling state of affairs. First, as a general matter, comparative criminal law is a relatively neglected and underdeveloped discipline; those studies that do exist are mainly concerned with procedural rather than substantive law.⁶ Second, legal reform rather than accurate description has often been at the heart of comparative research.⁷ To take a typical example, Professor Stanley Yeo recently compared the *mens rea* elements for murder under the Canadian and Indian codes with those proposed by an Australian law reform body.⁸ He found the existing Canadian code deficient in multiple respects and proposed a number of specific improvements, including removing two superfluous phrases and adding a fault element based on

⁵ See, e.g., E. ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS* 286 (Atheneum 1968) (1954) (concluding without further elaboration that specific forms of justified and unjustified killing are universal); Margaret Mead, *Some Anthropological Considerations Concerning Natural Law*, 6 NAT. LAW F. 51, 52 (1961) (same); see also DONALD E. BROWN, *HUMAN UNIVERSALS* 138 (1991); MAX GLUCKMAN, *THE IDEAS IN BAROTSE JURISPRUDENCE* 204-41 (1965); Clyde Kluckhohn, *Common Humanity and Diverse Cultures*, in *THE HUMAN MEANING OF THE SOCIAL SCIENCES* 245 (Daniel Lerner ed., 1959); Frederic Maitland, *The Early History of Malice Aforethought*, 8 L. MAG. & REV. 406 (1883), reprinted in 1 *THE COLLECTED PAPERS OF FREDERIC MAITLAND* 304 (1911).

⁶ See Markus Dirk Dubber, *Comparative Criminal Law*, in *OXFORD HANDBOOK OF COMPARATIVE LAW* 1308-09 (Mathias Reimann & Reinhard Zimmerman eds., 2006).

⁷ *Id.* at 1302-05.

⁸ Stanley Yeo, "Murder" *She Said: Canadian, Indian and Australian Formulations of the Fault Elements for Murder*, 49 U.N.B.L.J. 21 (2000).

recklessness alone.⁹ Another representative study by Professor Alison Young analyzes the legal defenses available to battered women who kill their abusers in England and in Canada, advocating the reform of English law in light of recent developments in the Canadian Supreme Court.¹⁰ Likewise, two academics in New Zealand recently examined the jurisprudence of New Zealand and South Africa with regard to the lawfulness of homicide committed while effecting arrests.¹¹ The authors explain that their primary objective is to reduce the number of homicides occurring in the course of making an arrest.¹² Although isolated and narrowly circumscribed doctrinal articles like these possess considerable practical value, they fail to speak directly to the broader scientific question at issue.

More comprehensive studies in comparative criminal law also tend to have a practical and reform-minded orientation. The monumental sixteen-volume "Comparative Depiction of German and Foreign Criminal Law" published under the direction of the German Justice Ministry from 1905 to 1909, for instance, was designed in connection with the reform of the German criminal code.¹³ Although it contains a great deal of relevant information, it is not conceived or organized in a manner that is particularly useful to those researchers in anthropology, cognitive science, experimental philosophy, or related fields who might seek to identify moral universals or to elaborate modern conceptions of universal jurisprudence. Other large-scale projects follow the same pattern. For example, *Homicide Law in Comparative Perspective*,¹⁴ an informative volume edited by Professor Jeremy Holder, consists of a collection of essays arising out of reform proposals of the Law Commission for England and Wales. Each contributor analyzes the law of homicide in his or her respective jurisdiction. Although the precise structure of the homicide prohibition and its various fault elements are given serious attention, the dominant orientation remains legislative reform.

⁹ *Id.* at 32.

¹⁰ Alison Young, *Conjugal Homicide and Legal Violence: A Comparative Analysis*, 31 OSGOODE HALL L.J. 761 (1993).

¹¹ Michael Spisto & Fran Wright, *(Justifiable) Homicide Whilst Effecting an Arrest: When is this Lawful? A Comparison between the South African and New Zealand Systems of Law*, 7 WAIKATO L. REV. 147 (1999).

¹² *Id.*

¹³ See generally VERGLEICHENDE DARSTELLUNG DES DEUTSCHEN UND AUSLÄNDISCHEN STRAFRECHTS: VORARBEITEN ZUE DEUTSCHEN STRAFRECHTREFORM (1905-1909), cited and discussed by Dubber, *supra* note 6, at 1303.

¹⁴ HOMICIDE LAW IN COMPARATIVE PERSPECTIVE (Jeremy Holder ed., 2007).

Further, only nine jurisdictions are represented. Needless to say, while this type of comparative research can be suggestive, it is an insufficient basis on which to ground controversial claims about human universals or cause the broader scientific community to sit up and take notice.

The foregoing review highlights another limitation of the existing literature on comparative criminal law: it is often restricted to nations or cultures that fall within a particular geographic region or share a common legal history, in particular that of European colonialism. The comparative enterprise spawned by the spread of English common law is probably the most familiar modern example of this phenomenon, but the same holds true of French, German, and other influential systems of law.¹⁵ In these colonial and post-colonial settings, comparative scholars have typically examined isolated topics of interest, such as the law of reckless homicide or the variable role of provocation as a mitigating plea to homicide in Commonwealth countries.¹⁶ Once again a sound basis for significant generalizations that might cut broadly across cultural, geographic, or historical boundaries appears to be lacking.

To be sure, a few scattered studies exist that have extended our intellectual horizons somewhat beyond the relatively narrow constraints that characterize most comparative research. In 1912, Professor D. Oswald Dykes surveyed the homicide classifications of several unrelated jurisdictions, including England, Scotland, continental Europe, the United States, and India.¹⁷ Another early article by Professor Charles Lobinger examined the law of homicide in England, France, Spain, Germany, Japan, and China.¹⁸ More recently, Professor Igor Andrejew's analysis of criminal law in socialist

¹⁵ German scholars, for instance, were among the founders of legal anthropology, and they developed a keen interest in customary tribal law in Africa and elsewhere. See, e.g., Andrew Lyall, *Early German Legal Anthropology: Albert Hermann Post and His Questionnaire*, 52 J. AFRICAN LAW 114 (2008). The classic illustration of common legal origins, of course, is the Roman law foundation of virtually all Western and many non-Western legal systems. See, e.g., HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983); ALAN WATSON, *ROMAN LAW AND COMPARATIVE LAW* (1991).

¹⁶ See, e.g., M. Sornarajah, *Commonwealth Innovations on the Law of Provocation*, 24 INT'L & COMP. L.Q. 184 (1975); M. Sornarajah, *Reckless Murder in Commonwealth Law*, 24 INT'L & COMP. L.Q. 846 (1975).

¹⁷ D. Oswald Dykes, *Classifications of Homicide—A Study in Comparative Law*, 24 JURID. REV. 184 (1912-1913).

¹⁸ Charles Sumner Lobinger, *The Homicide Concept—A Study in Comparative Criminal Law*, 9 J. AM. INST. CRIM. L. & CRIMINOLOGY (1918-1919).

countries utilized common political and economic structures as criteria for analyzing penal systems not only in former Eastern Bloc countries, but also in Mongolia, North Korea, China, and North Vietnam.¹⁹

In addition, the federalist system of the United States has long afforded an opportunity for sustained comparative analysis, albeit of a domestic and highly integrated variety. For example, the nineteenth century witnessed the publication of a number of useful treatises in the United States dedicated to the law of homicide, and these volumes often included a significant comparative dimension.²⁰ Likewise, the American Law Institute's Model Penal Code is, in effect, a substantial comparative project that seeks to organize and reform the body of common and statutory law that has accumulated over several centuries in both state and federal jurisdictions.²¹ This massive effort has had a major influence on legal education throughout the English-speaking world and beyond, and it has inspired similar projects in Latin America and elsewhere.²² Finally, in recent years leading criminal law theorists such as Markus Dubber,²³ George Fletcher,²⁴ Stuart Green,²⁵ and other scholars have begun to call for a more sustained engagement with foreign, international, and transnational materials, and many of them have made significant contributions toward that end.²⁶ From a scientific perspective, however, even these more ambitious scholarly endeavors comprise relatively limited and

¹⁹ IGOR ANDREJEV, *DROIT PÉNAL COMPARÉ DES PAYS SOCIALISTES*, (Maciej Szepietowski, trans.) (1981).

²⁰ See, e.g., FRANCIS WHARTON, *A TREATISE ON THE LAW OF HOMICIDE IN THE UNITED STATES* (Philadelphia, Kaye & Brother, 1855); THE MICHIE CO., *A TREATISE ON THE LAW OF HOMICIDE* (1914); JAMES M. KERR, *A TREATISE ON THE LAW OF HOMICIDE* (New York & Albany, Banks & Brothers, 1891).

²¹ See generally MODEL PENAL CODE.

²² JUAN BUSTOS RAMIREZ & MANUEL VALENZUELA BEJAS, *LE SYSTÈME PENAL DES PAYS DE L'AMÉRIQUE LATINE 7* (Jacqueline Bernat de Celis trans., 1983).

²³ See, e.g., Dubber, *supra* note 6; see also MARKUS DUBBER & MARK KELMAN, *AMERICAN CRIMINAL LAW: CASES, STATUTES, COMMENTS* (2005); Markus D. Dubber, *Criminal Law in Comparative Context*, 56 J. LEGAL EDUC. 433 (2006).

²⁴ See, e.g., GEORGE FLETCHER, 1 *THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL: FOUNDATIONS* (2007) [hereinafter FLETCHER, *THE GRAMMAR OF CRIMINAL LAW*]; GEORGE FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* (1998) [hereinafter FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW*].

²⁵ See, e.g., Stuart Green, *The Universal Grammar of Criminal Law*, 98 MICH. L. REV. 2104 (1998) (reviewing FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW*, *supra* note 24).

²⁶ For one notably impressive effort in this direction, see DAVID LUBAN, JULIE R. O'SULLIVAN & DAVID P. STEWART, *INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW* (2010).

piecemeal investigations, particularly when measured against analogous fields like comparative linguistics. Significantly, none of these efforts have been so bold as to hypothesize and then systematically investigate the possible universal structure of the homicide prohibition, let alone its potential reflection of innate moral capacities.

These preliminary remarks supply a useful framework for introducing the novel research project in cognitive science and comparative criminal law summarized in the remainder of this Essay. Drawing on several years of intensive work, my research assistants and I have begun to fill a major gap in the literature and thereby help to advance our theoretical understanding of moral and legal universals—and, ultimately, of the evolutionary, neurocognitive, and cultural processes that generate and support them—by examining how the prohibition of homicide is codified in several hundred jurisdictions throughout the world, including all of the 204 member-states of the United Nations and the Rome Statute of the International Criminal Court.²⁷ Among other objectives, our study seeks to identify the proportion of jurisdictions that criminalizes one or more forms of homicide and that includes a mental state element in their definition of criminal homicide. The study also seeks to examine the prevalence and substance of specific justifications and excuses, including eight of the most prominent legal defenses: (1) self-defense, (2) necessity, (3) insanity or mental illness, (4) duress or compulsion, (5) provocation, (6) intoxication, (7) mistake of fact, and (8) mistake of law.

Although this research program is still unfolding, the main provisional finding thus far is that the prohibition of homicide does appear to be both universal and highly invariant, at least within the parameters of our investigation, which is restricted to codified law and excludes other sources of legal norms, such as custom or case law, and which is aimed primarily at uncovering broad generalizations related to the foregoing categories, rather than identifying other, more specific differences. In particular, all of the jurisdictions investigated thus far do appear to criminalize one or more forms of homicide. In addition, all of these jurisdictions do appear to include a

²⁷ The project was conceived over ten years ago in connection with some comparative research on the law of homicide that I undertook in law school and later published in the *Stanford Law Review*. See generally John Mikhail, *Law, Science and Morality: A Review of Richard Posner's 'The Problematics of Moral and Legal Theory'*, 54 STAN. L. REV. 1057, 1098-1110 (2002).

mental state element in their definitions of unlawful homicide. That is, none of the jurisdictions investigated thus far adopt a purely strict liability approach to unlawful homicide.

In addition, the particular justifications and excuses identified thus far in our research are remarkably similar and appear to consist of a relatively short list of familiar categories, including the eight main defenses enumerated above. Among other things, this suggests that the specific circumstances in which intentional killing is held to be justified or excused may be far more constrained than many commentators have implied.²⁸ On the other hand, there does appear to be significant diversity with respect to some of these defenses, at least at the level of codified law. Specifically, although some of the most common defenses, such as self-defense and insanity/mental illness, appear to be universal or nearly so, other categories, such as necessity, duress and provocation, appear somewhat less prevalent.

The main provisional results of the study are exhibited in Table 1, which supplies a representative sample of 41 of the 205 jurisdictions (i.e., 20%) included thus far in our research. As Table 1 implies, the methods employed in our investigation were relatively simple and straightforward. An alphabetical list of countries was compiled and the relevant provisions of each jurisdiction's penal code were located using a variety of sources, including collections such as *The American Series of Foreign Penal Codes*,²⁹ websites such as that of the Buffalo Criminal Law Center,³⁰ and other available print and web resources. Each set of provisions was copied or transcribed into a single master document, which eventually ran to over one thousand pages.³¹ Whenever possible, official English translations of non-English codes were utilized. In the case of those countries for which no English translation was available, researchers copied or transcribed the relevant code provisions in the available

²⁸ See, e.g., RICHARD POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 121 (1999); Chandra Sekhar Sripada, *Nativism and Moral Psychology: Three Models of the Innate Structure that Shapes the Contents of Moral Norms*, in 1 *MORAL PSYCHOLOGY: THE EVOLUTION OF MORALITY: ADAPTATIONS AND INNATENESS* 319-44 (W. Sinnott-Armstrong ed., 2008).

²⁹ See generally 1-29 *THE AMERICAN SERIES OF FOREIGN PENAL CODES* (1960-1987).

³⁰ Buffalo Criminal Law Center, <http://wings.buffalo.edu/law/bclc/> (last visited Feb. 18, 2010).

³¹ See John Mikhail, *Homicide: A Universal Prohibition* (tentative title) (March 8, 2010) (unpublished manuscript, on file with author).

language and then translators supplied provisional English translations.

Using the criteria listed below, researchers then analyzed the code provisions, seeking to determine whether each of the following seven categories was satisfied by a given jurisdiction. As an initial matter, we limited our attention to whether a given jurisdiction criminalizes homicide, whether its definition of homicide includes a mental state element, and whether it recognizes the defenses of self-defense, insanity/mental illness, necessity, duress, and provocation. Intoxication, mistake of fact, and mistake of law are therefore not included in the following analysis. All of the seven categories that were utilized in the study are, of course, open to multiple interpretations, but three of them especially so: necessity, duress, and whether the given jurisdiction includes a mental state requirement in its definition of homicide. As a rough first cut, therefore, a decision was made to analyze these three categories using two sets of criteria, one more restrictive and the other more inclusive. Both sets of criteria are given below.

1. Criminal Homicide

Criteria: Do the available codified laws of the jurisdiction make the killing of a human being a crime?

Results: 41/41 (100%) of tabulated jurisdictions criminalize homicide.

2. Mental Element to Homicide

First Set of Criteria (more restrictive): Do the available codified laws of the jurisdiction incorporate the mental state of the offender (e.g., intent, malice, etc.) into its definition of murder or other forms of criminal homicide? Codes which include a separate offense of “unintentional” or “negligent” homicide, or similar offenses, are included by negative implication. In addition, codes which limit criminal liability to acts committed with intent in a general part or other general section of the code, unless otherwise specified by law, are also included.

Results: 38/41 (93%) of tabulated jurisdictions include a mental element in their definition of criminal homicide.

Second Set of Criteria (more inclusive): All of the jurisdictions included under the first set of criteria, plus jurisdictions that supply a mental element requirement

Country (n = 41)	Criminal Homicide	Mental Element (restrictive)	Mental Element (inclusive)	Self-Defense	Insanity / Mental Illness	Necessity (restrictive)	Necessity (inclusive)	Duress (restrictive)	Duress (inclusive)	Provocation
	Total 41 Percentage: 100.00%	Total 38 Percentage: 92.68%	Total 41 Percentage: 100.00%	Total 38 Percentage: 92.68%	Total 38 Percentage: 92.68%	Total 25 Percentage: 60.98%	Total 33 Percentage: 80.49%	Total 32 Percentage: 78.05%	Total 34 Percentage: 82.93%	Total 28 Percentage: 68.29%
Madagascar	X	X	X	X	X		X	X	X	X
Mali	X	X	X	X	X		X	X	X	X
Mauritius	X	X	X	X	X		X	X	X	
Mongolia	X	X	X	X	X	X	X	X	X	X
Nauru	X	X	X	X	X	X	X			X
Niger	X	X	X	X	X		X	X	X	X
Palau	X	X	X							X
Peru	X	X	X	X	X	X	X	X	X	
Romania	X	X	X	X	X	X	X	X	X	
Saint Lucia	X	X	X	X	X	X	X	X	X	X
Serbia	X	X	X	X	X	X	X	X	X	X
Slovenia	X	X	X	X	X	X	X	X	X	
South Korea	X		X	X	X	X	X	X	X	
Spain	X	X	X	X	X	X	X	X	X	X
Switzerland	X	X	X	X	X	X	X	X	X	X
Tonga	X	X	X		X					X
Tuvalu	X	X	X	X	X			X	X	X
Uruguay	X	X	X	X	X	X	X	X	X	X
Vanuatu	X	X	X	X	X			X	X	X
Zanzibar	X	X	X	X	X			X	X	X

Table 1: Structure of the Homicide Prohibition in Forty-One Jurisdictions

indirectly, for example, by means of a general mistake of fact provision that exempts an offender from criminal liability, or jurisdictions for which a mental element is otherwise implied. Jurisdictions that distinguish separate crimes for murder and manslaughter, without corresponding definitions, are also included.

Results: 41/41 (100%) of tabulated jurisdictions include a mental element to homicide, including indirect or implied elements.

3. Self-Defense (or Defense of Others)

Criteria: Do the available codified laws of the jurisdiction allow for justification, excuse, or reduced punishment if the act was committed in defense of self or others? These criteria may be satisfied by provisions that identify self-defense or defense of others as a complete defense or by provisions that provide for mitigated punishment. Jurisdictions that explicitly state that self-defense or defense of others is a mitigating factor are included, even if the degree of mitigation is left to the discretion of the judge. Jurisdictions that provide blanket grants of discretion to the judge for generic or unspecified mitigating factors, however, are not included. Also excluded in this tabulation are provisions which more closely resemble provocation defenses, even though many of these provisions might be applicable in situations of self-defense as well. Codes with necessity-like defensive force provisions were evaluated on a case-by-case basis.

Results: 38/41 (93%) of tabulated jurisdictions meet the stated criteria for Self Defense (or Defense of Others).

4. Insanity or Mental Illness

Criteria: Do the available codified laws of the jurisdiction allow for justification, excuse, or reduced punishment based on the insanity, mental illness, or other mental incapacity of the offender? These criteria may be satisfied by provisions that identify insanity or mental illness as a complete defense or by provisions that mitigate punishment based on these characteristics or some analogous mental incapacity. Codes that explicitly state that insanity, mental illness, or other mental incapacity is a mitigating factor are included, even if the degree of mitigation is left to the discretion of the judge. Jurisdictions

that provide blanket grants of discretion to the judge for generic or unspecified mitigating factors, however, are not included.

Results: 38/41 (93%) of tabulated jurisdictions meet the stated criteria for Insanity / Mental Illness.

5. Necessity

First Set of Criteria (more restrictive): Do the available codified laws of the jurisdiction allow for justification, excuse, or reduced punishment if the act was committed in circumstances in which a defendant commits a crime or causes harm to a protected interest for the purpose or with the foreseeable effect of avoiding a greater crime, harm, or evil? Jurisdictions that provide for a similar defense defined in terms of reasonableness or under the heading of “choice of evils,” “emergency,” or “state of necessity,” without further elaboration, are included.

Results: 25/41 (61%) of tabulated jurisdictions meet the stated criteria for Necessity.

Second Set of Criteria (more inclusive): All of the jurisdictions included under the first set of criteria, plus jurisdictions that refer to an “irresistible fear,” “threat of imminent death or serious harm,” force majeure, or similar concepts, as well as jurisdictions that include certain other provisions that more closely resemble duress defenses.

Results: 33/41 (80%) of tabulated jurisdictions meet the more inclusive criteria for Necessity, including provisions related to “irresistible force,” “threat of imminent harm,” force majeure, or similar concepts, or which more closely resemble duress defenses.

6. Duress / Compulsion

First Set of Criteria (more restrictive): Do the available codified laws of the jurisdiction allow for justification, excuse, or reduced punishment if the act was committed under duress, coercion, irresistible fear, or similar compulsory conditions? Although the actual operation of these provisions may be uncertain, jurisdictions that include such provisions are included, unless homicide is specifically exempted.

Results: 32/41 (78%) of tabulated jurisdictions meet the stated criteria for Duress / Compulsion.

Second Set of Criteria (more inclusive): All of the jurisdictions included under the first set of criteria, plus

jurisdictions that refer to “an unavoidable threat,” “necessary evil,” or similar concepts, as well as jurisdictions that include certain other provisions that more closely resemble necessity defenses.

Results: 34/41 (83%) of tabulated jurisdictions meet the more inclusive criteria for Duress / Compulsion, including provisions related to “unavoidable threat,” “necessary evil,” or similar concepts, or which more closely resemble necessity defenses.

7. Provocation

Criteria: Do the available codified laws of the jurisdiction allow for justification, excuse or reduced punishment if the act was provoked by the victim? Jurisdictions that include provisions such as “heat of passion,” “under the influence of violent emotions,” or similar concepts are included.

Results: 28/41 (68%) of tabulated jurisdictions meet the stated criteria for Provocation.

The main provisional results for each of these seven categories are represented graphically in Figure 1. Stated in its strongest form, the picture that emerges from this research is that legal systems and therefore individuals throughout the world recognize that intentional killing without justification or excuse is prohibited, and that self-defense and insanity, and to a lesser extent necessity, duress, and provocation, can sometimes be potentially valid justifications or excuses. These are noteworthy generalizations that to the best of my knowledge go beyond anything comparable in the existing scientific or legal literature in uncovering or at least beginning to illuminate the properties of a specific universal or near-universal norm against homicide. They also directly challenge the conventional relativist assumption that although “[t]here are certain high-level themes that one sees in the contents of moral norms in virtually all human groups—themes such as harms, incest, helping and sharing, social justice, and group defense . . . the specific rules that fall under these themes exhibit enormous variability.”³²

³² Sripada, *supra* note 28, at 330; cf. POSNER, *supra* note 28, at 6 (arguing that “what counts as murder . . . varies enormously from society to society”).

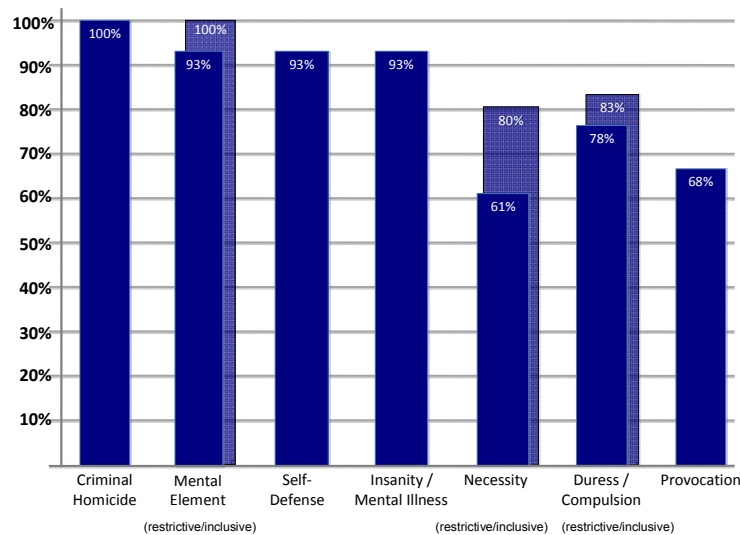


Figure 1: Universal Elements of the Homicide Prohibition (n = 41 jurisdictions)

In addition, these findings imply that at least some technical legal definitions of prohibited acts and recognized defenses may indeed capture the structure of common moral intuitions.³³ To this extent they lend support to the hypothesis that human beings are “intuitive lawyers” who possess tacit or implicit moral and legal knowledge and a natural ability to compute structurally complex unconscious representations of human acts and their components (the “moral grammar hypothesis” that commentators have begun to debate in recent years).³⁴ For example, these findings reinforce and extend the

³³ See John Mikhail, *Universal Moral Grammar: Theory, Evidence, and the Future*, 11 *TRENDS IN COGNITIVE SCI.* 143, 151 (2007).

³⁴ See generally JOHN MIKHAIL, *ELEMENTS OF MORAL COGNITION: RAWLS’ LINGUISTIC ANALOGY AND THE COGNITIVE SCIENCE OF MORAL AND LEGAL JUDGMENT* (2010); John Mikhail, *Moral Grammar and Intuitive Jurisprudence: A Formal Model of Unconscious Moral and Legal Knowledge*, in *THE PSYCHOLOGY OF LEARNING AND MOTIVATION*, VOL. 50: MORAL JUDGMENT AND DECISION-MAKING 27-100 (D. Bartels et al., eds., 2009); John Mikhail, “*Plucking the Mask of Mystery from Its Face*”: *Jurisprudence and H.L.A. Hart*, 95 *GEO. L. J.* 733 (2007); see also, e.g., KWAME ANTHONY APPIAH, *EXPERIMENTS IN ETHICS* (2008); MARKUS DIRK DUBBER, *THE SENSE OF JUSTICE: EMPATHY IN LAW AND PUNISHMENT* (2006); MARC D. HAUSER, *MORAL MINDS: HOW NATURE DESIGNED OUR UNIVERSAL SENSE OF RIGHT AND WRONG* (2006); RAY JACKENDOFF, *LANGUAGE, CONSCIOUSNESS, AND CULTURE: ESSAYS ON MENTAL STRUCTURE* (2009); JESSE PRINZ, *THE EMOTIONAL CONSTRUCTION OF MORALS* (2007); Monica Bucciarelli, Sangeet Khemlani, & P. N. Johnson-Laird, *The Psychology of Moral Reasoning*, 3 *JUDGMENT & DECISION MAKING* 121 (2008); Emmanuel Dupoux & Pierre Jacob, *Universal Moral Grammar: A Critical Appraisal*, 11 *TRENDS IN COGNITIVE SCI.* 373 (2007); Susan Dwyer, *How Good is the Linguistic Analogy?*, in *THE INNATE MIND*, VOL. 2: *CULTURE AND COGNITION* 237-56 (Peter Carruthers, Stephen Laurence & Stephen Stich,

discovery that three and four year-old children utilize what is, in effect, a *mala in se/mala prohibita* distinction when making moral judgments, distinguishing “genuine” or intrinsic moral violations (e.g., battery, theft) from violations of social conventions (e.g., wearing pajamas to school);³⁵ that four and five year-olds utilize what is, in effect, a mistake of law/mistake of fact distinction in the same context, recognizing that false factual beliefs can often serve to exculpate, but false moral beliefs typically do not;³⁶ that adults make moral judgments in conformity with central doctrines of torts and criminal law, relying in particular on three key principles that distill the essence of the legal prohibition of purposeful battery: “(a) Harm caused by action is worse than harm caused by omission, (b) harm intended as the means to a goal is worse than harm foreseen as the side effect of a goal, and (c) harm involving physical contact with the victim is worse than harm involving no physical contact”;³⁷ and that specific brain regions, including the right temporoparietal junction, precuneus, and ventromedial prefrontal cortex, are selectively recruited during moral judgment tasks that require sensitivity to an agent’s intentions, such as cases of mistake, ignorance, impossible attempt, and double effect.³⁸

eds., 2006); Michael D. Guttentag, *Is There a Law Instinct?* 87 WASH. U. L. REV. 269 (2009); Joshua Greene, *Cognitive Neuroscience and the Structure of the Moral Mind*, in THE INNATE MIND, VOL. 1: STRUCTURE AND CONTENTS 338-52 (Peter Carruthers, Stephen Laurence & Stephen Stich, eds., 2005); Robin Bradley Kar, *The Deep Structure of Law and Morality*, 84 TEX. L. REV. 877 (2006); Matthias Mahlmann, *Theorizing Transnational Law: Varieties of Transnational Law and the Universalistic Stance*, 10 GERMAN L. J. 1325 (2009); Matthias Mahlmann, *Ethics, Law, and the Challenge of Cognitive Science*, 8 GERMAN L. J. 577 (2007); Greg Miller, *The Roots of Morality*, 320 SCIENCE 734 (2008); Shaun Nichols, *Innateness and Moral Psychology*, in THE INNATE MIND, VOL. 1: STRUCTURE AND CONTENTS, *supra* at 353-69; Dennis Patterson, *On the Conceptual and the Empirical: A Critique of John Mikhail’s Cognitivism*, 73 BROOK. L. REV. 1053 (2008); Steven Pinker, *The Moral Instinct*, N.Y. TIMES MAG., Jan. 13, 2008; Paul H. Robinson, Robert Kurzban, & Owen D. Jones, *The Origins of Shared Intuitions of Justice*, 60 VAND. L. REV. 1633 (2007); Stephen Stich, *Is Morality an Elegant Machine or a Kluge?* 6 JOURNAL OF COGNITION AND CULTURE 181 (2006).

³⁵ See, e.g., ELLIOT TURIEL, THE DEVELOPMENT OF SOCIAL KNOWLEDGE: MORALITY AND CONVENTION (1983); Judith G. Smetana, *Social Cognitive-Development: Domain Distinctions and Coordinations*, 3 DEV. REV. 131 (1983).

³⁶ See, e.g., Michael J. Chandler, Bryan W. Sokal & Cecilia Wainryb, *Beliefs About Truth and Beliefs About Rightness*, 71 CHILD DEV. 91 (2000); see also John Mikhail, *The Poverty of the Moral Stimulus*, in MORAL PSYCHOLOGY, VOL. 1: THE EVOLUTION OF MORALITY: ADAPTATIONS AND INNATENESS 353-59 (W. Sinnott-Armstrong, ed., 2008).

³⁷ Fiery Cushman, Liane Young, & Marc Hauser, *The Role of Conscious Reasoning and Intuition in Moral Judgment: Testing Three Principles of Harm*, 17 PSYCH. SCI. 1082 (2006).

³⁸ See, e.g., Liane Young & Rebecca Saxe, *The Neural Basis of Belief Encoding and Integration in Moral Judgment*, 40 NEUROIMAGE 1912 (2008); Liane Young, Fiery A.

Furthermore, these comparative data also point to a variety of novel experimental protocols in anthropology, cognitive neuroscience, developmental psychology, and other disciplines that could shed further light on the moral grammar hypothesis. For example, our findings suggest that researchers in these fields would benefit from relying more directly on legal theory and actual legal cases to uncover the properties of the mental representations implicit in common moral intuitions and to describe their behavioral and neurological effects. Cases of mistake, ignorance, attempt, double effect, self-defense, necessity, negligence, proximate causation, and other familiar doctrines should be the bread and butter of cognitive scientists seeking to discover the structure of the moral mind, and these researchers should rely more heavily on the sophisticated theoretical vocabulary of the law to design and interpret the results of their experiments. All of these conclusions and the findings themselves should be approached cautiously, however, and considered in light of several important caveats and qualifications. In what follows, I briefly identify four such considerations, leaving a more comprehensive discussion of them for another occasion.

First, it is important to clarify at the outset that the goal of our study is accurate description rather than prescription, justification, or some other normative objective. Even if it were true that all or most jurisdictions adopt one or another approach to homicide, this fact by itself would not thereby commend or justify that approach, nor is our present concern to address this or any other normative issue.

Second, it seems equally important to emphasize that familiar problems of classification, interpretation, and terminology are serious and non-trivial in this context, as are the more general problems of bias and ethnocentrism. Does Western science, in this case Western jurisprudence, furnish abstract concepts that can be fruitfully used to describe and analyze social, legal, and mental phenomena in non-Western, tribal, or small-scale societies, or does any such cultural imposition lead inevitably to theoretical distortion and confusion? Legal anthropologists and other researchers have

Cushman, Marc D. Hauser, & Rebecca Saxe, *The Neural Basis of the Interaction Between Theory of Mind and Moral Judgment*, 104 PROC. NAT. ACAD. SCI. 8235 (2007); see also Michael Koenigs, Liane Young, Ralph Adolphs, Daniel Tranel, Fiery Cushman, Marc Hauser, & Antonio Damasio, *Damage to the Prefrontal Cortex Increases Utilitarian Moral Judgements*, 446 NATURE 908 (2007).

debated these and related topics at great length;³⁹ however, the issues remain unresolved, and the most plausible answers to these vexed questions fall beyond the scope of this Essay. For present purposes, I wish to avoid getting tangled in these familiar methodological debates, while at the same time clearly acknowledging their importance and the need to give them serious and sustained consideration.

Third, one might justifiably raise several interrelated concerns about the specific codes and analytical criteria utilized in this study. For example, some of the codes seem clearly outdated, and others seem likely to have been revised or amended without our knowledge. Because of the large expenditure of time and effort it took to locate a code for each jurisdiction, it was not always possible to verify that its relevant provisions were currently in effect in that jurisdiction. It must be admitted, moreover, that the analytical criteria used thus far in our research are crude and stand in need of further refinement. As informed observers will recognize, many of the complexities that occupy serious criminal law theory have been ignored or deliberately pushed under the rug. So, too, there are countless interpretive problems having to do with language and linguistic diversity in a study like this, along with unavoidable pitfalls of translation. "A primary goal of comparative law is to become aware of the way in which language shapes legal culture," Professor Fletcher observes, "and doing so requires an exploration of why some terms have a nearly universal meaning and others are culturally specific."⁴⁰ Thus far, our study falls well short of this exploration, and to that extent it seems clearly deficient.

Finally, although a plausible argument can be made for the proposition that codified legal norms are a useful source of information from which to draw inferences about human psychology,⁴¹ one should approach this endeavor cautiously. Even with respect to the substantive criminal law, the number

³⁹ For some valuable critical discussion of these issues, see, for example, Paul Bohannan, *Ethnography and Comparison in Legal Anthropology*, in *LAW IN CULTURE AND SOCIETY* 401-18 (Laura Nader ed., 1997); Max Gluckman, *Concepts in the Comparative Study of Tribal Law*, in *LAW IN CULTURE AND SOCIETY*, *supra*, at 349-73; Laura Nader, *Introduction*, in *LAW IN CULTURE AND SOCIETY*, *supra*, at 1-10; see also BROWN, *supra* note 5, at ch. 1; Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, in CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS* ch. 1 (1973).

⁴⁰ FLETCHER, *GRAMMAR OF CRIMINAL LAW*, *supra* note 24, at 118.

⁴¹ See generally Miller, *supra* note 34; see also Mikhail, *Moral Grammar and Intuitive Jurisprudence*, *supra* note 34.

and variety of factors that determine the form and substance of such codes beggar the imagination. Evidently, the mind's own hidden rules of moral judgment are merely one of many variables entering into this process. This complexity and the resulting idealization that any such endeavor necessarily assumes must be kept firmly in mind, particularly when one is considering the possibility of relating universal features of criminal law to features of human nature.⁴²

Despite these and other important qualifications, it seems clear that the provisional data presented in this Essay bear directly on the question of moral universals and mark a potentially significant turning point in our understanding of this topic. The theoretical insight provided by the detailed analysis of codified legal norms is real and substantial. Particularly when a codified prohibition appears to exist and operate throughout the world, this type of research serves to illustrate how the systematic investigation of a richly structured norm can advance the existing debate about moral universals beyond its ordinary parameters. As this research project continues to unfold, it seems likely that it will enable scientists to describe the mental rules and representations underlying human moral intuitions with much greater accuracy than has been heretofore possible. Furthermore, the apparent universality or near-universality of the homicide prohibition suggests, although it does not entail, that the moral grammar hypothesis is sound, thereby reinforcing the assumption that future research in moral psychology should build on this naturalistic foundation.

⁴² On the other hand, it is important to note that because many jurisdictions recognize particular defenses such as necessity, duress, and provocation through the development of case law rather than codification, relying exclusively on codified elements of the homicide prohibition may significantly understate the universality of these defenses. If one were to research the case law in these jurisdictions, one might discover that these defenses are recognized more frequently, perhaps even rivaling the data on criminalization, intent, self-defense, and insanity/mental illness.